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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 334

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN TUBE BENDING CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered on June 7, 1943 (R. 90), denying the petition of the Board for enforcement of its order against American Tube Bending Co., Inc.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 83-86) is reported in 134 F. (2d) 993. The findings of fact, conclusions of law, and order of the Board (R. 57-80) are reported in 44 N. L. R. B. 121.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 7, 1943 (R. 90). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. The Board found that the employer, just prior to an election conducted by the Board, circulated antiunion propaganda among his employees; assembled them in the plant and cautioned them against the selection of representatives for collective bargaining; indicated that the election would afford an opportunity to choose his leadership or that of a union; cast aspersions on the leaders of one of the unions on the ballot; implied that loyalty to him would lead to repudiation of collective bargaining; and intimated that on certain vital issues collective bargaining would be fruitless and would, in fact, react to the employees' detriment. Could the Board properly find that thereby the employer interfered with, restrained or coerced the employees in the exercise of the rights guaranteed in Section 7 of the Act?

2. Assuming that the above question is answered in the affirmative, is the employer privileged by virtue of the First Amendment thus to interfere with, restrain, or coerce his employees in the exercise of their right to self-organization?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151 *et seq.*) are set out in the Appendix.

STATEMENT

A charge having been filed by Local 420, International Association of Machinists, A. F. of L., herein called Machinists, and the Board having issued its complaint against respondent, alleging the commission of unfair labor practices, the Board, the respondent and the Machinists entered into a stipulation waiving hearing and providing that the record in the case should consist of certain agreed facts, a transcript of certain testimony, and certain annexed exhibits (R. 1-8). In accordance with the terms of the stipulation, the Board thereupon issued its decision setting forth its findings of fact, conclusions of law, and order (R. 57-80). The facts as found by the Board and as shown by the evidence may be summarized as follows:¹

Upon petition for investigation and certification of representatives filed by the Machinists, the Board directed that an election be held on December 2, 1941 (R. 58; 47-51). On November 28, 1941, 4 days before the election, Jones, re-

¹ In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

spondent's president, addressed a letter on company stationery to each employee in which the pending election was discussed (R. 62-65; 40-42). On December 1, 1941, the day before the election, all of respondent's employees who were eligible to vote in the election were directed by the foremen to assemble at a designated place in the plant, where President Jones read a prepared message to the employees (R. 65-70; 42-46, 54-56).²

In the letter Jones assured the employees that they were free to vote against either of the two unions on the ballot regardless of whether they had applied for membership or had in fact become members of either of the competing labor organizations (R. 63, 64; 41).³ Jones extolled the Company's wage policy and asserted that wages could not be raised without causing a curtailment of operations and a consequent decline of employment (R. 64; 41, 42). The employees were informed that respondent afforded to each a "sympathetic hearing" for their "own personal problems" and made adjustments fair to every-

² The employees were assembled in two groups: The first and second shifts, consisting of approximately 420 employees, were addressed at 3 p. m., and the third shift, consisting of approximately 60 employees, at shortly after 11 p. m. (R. 66; Bd. Exh. 8, R. 54, 55).

³ This statement was made at a time when 172 out of a total of 417 employees had signed application cards designating the Machinists as their exclusive bargaining representative (R. 73).

one (R. 64; 41). Jones asked the employees "to what kind of leadership" they were going to entrust their "future with the Company" (R. 64; 42). The Board found that President Jones thus made himself a party to the election (R. 71, 72).

He intensified his antiunion campaign in the pre-election day address (R. 72). Collective bargaining, he asserted, would never move the respondent to recede from its open-shop policy (R. 67; 43-44). No improvement in wage rates could be expected as a result of collective bargaining since the respondent was already paying wages as high as could be paid without loss of business (R. 67, 68; 44, 45). Collective bargaining would, he warned, interfere with recognition of individual merit and preclude individual wage increases which respondent had previously been alert to grant (R. 68, 69; 45). The employees were directed to choose whether they wanted as their "leader" either of the unions or the "present management" of their Company (R. 72, 73; 45, 46). An admonition that the employees would have to pay for representation by either union (R. 72; 45) was coupled with the implication that the leaders of the Machinists, whom Jones characterized as "total strangers," might be interested in dues alone (R. 73; 46).

The Board considered the letters and speeches not as isolated and independent phenomena, but, in connection with the circumstances in which they

were cast, as part of the entire "fabric of conduct" woven by respondent (R. 75). In these circumstances the Board concluded that respondent's campaign as a candidate in opposition to the unions was devised to exploit its influential employer status and thereby gain "tactical advantages which the unions could not possibly match" (R. 75). Thus the letters were written on company stationery, and the employees were directed by their supervisors to attend the meeting on company property, where Jones' speech was read (R. 75; 53-55). These tactics, the Board found, brought heavily into play the economic dependence of the employees upon respondent for their livelihood (R. 75). The Board, accordingly, concluded that because of the relationship existing between Jones and his audience, as well as the circumstances in which the communications were delivered, his remarks attained "a force stronger than their intrinsic connotation and beyond that of persuasion. They achieved a coercive effect * * *" (R. 76).

On these facts the Board held that respondent by its whole course of action had interfered with the conduct of the election and had attempted to influence the result of the election in such a manner as to constitute interference with the right of the employees to designate collective bargaining representatives free from coercion, and respondent had thereby interfered with, restrained and coerced its employees in the exercise of the rights

guaranteed in Section 7 of the Act (R. 77, 78). The Board ordered respondent to cease and desist from "in any manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act" and to inform its employees of its compliance both by posting notices in the plant and by addressing letters to each of its employees stating that it would not engage in the conduct from which it was ordered to cease and desist (R. 79-80).

The Board having petitioned the court below for enforcement of its order, the court on April 5, 1943, handed down its opinion (R. 83-86), and on June 7, 1943, entered a decree (R. 90) which reversed the Board's order and dismissed the petition for enforcement on the ground that the decision of this Court in *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, compelled the court to hold either that respondent's statements were not coercive, or that if coercive, they were privileged by virtue of the First Amendment.

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in construing the *Virginia Electric & Power* case to require the holding that respondent's utterances were not coercive, or that if coercive, they were privileged under the First Amendment.

2. The court below erred in failing to enforce the order of the Board.

REASONS FOR GRANTING THE WRIT

1. The court below misconceived, we believe, the scope of this Court's decision in *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469. In that case the Court found it difficult to sustain a conclusion of interference, restraint, and coercion on the basis of a certain bulletin and speeches purporting to advise the employees of their rights under the Act, where the Board failed to set forth in its findings the reasons and process of expert judgment by which it arrived at its conclusion. In the present case the Board analyzed in considerable detail the letters and speeches of the respondent and found them to be, in the circumstance of their delivery, coercive. We submit that the *Virginia Electric* case does not preclude giving effect to the Board's finding, supported as it is by evidence and analysis not present in that case. Compare *Securities & Exchange Comm. v. Chenery Corp.*, 318 U. S. 80.

The messages to the employees were unmistakably antiunion electioneering documents, which the employees were not at liberty to ignore. The letters were written on the company's stationery, signed by its president; the speeches were delivered when the employees had been assembled in the plant to listen. By identifying himself as in substance the third candidate on the ballot, the president converted the election into a test of loyalty to the management; and the address to

the employees made it clear that collective bargaining would be fruitless if it were designed to secure a union-shop agreement (R. 67; 32), and inimical if designed to secure wage increases (R. 68-69; 33). These warnings that union representation would bring collision with fixed policies of the company, and the injection of the management into the election as a virtual candidate for representative of the employees, to be supported or rebuffed, are factors sustaining the determination of the Board. The court below nevertheless expressly declined to pass on the sufficiency of the evidence to sustain the Board's findings under standards of review normally applied.

In other cases it has been recognized that a similar electioneering campaign by an employer creates a false issue, constitutes a forbidden interference with the right of free selection of employee representatives, and destroys the value of the ballot as evidence of the wishes of the employees. "The campaign conducted by the Company in opposition to the Union * * * created a false issue between the employees and their employer. The false issue was that the employees were to choose between the Company's executives and the Union. That was not the issue. The issue was whom would the employees have for their bargaining agent. Obviously the Company's executives could not be. Who is to represent the employees as bargaining agent and the manner of

selection are matters which belong exclusively to the employees. The statute has made it so, and it is the duty of the employer to keep hands off and maintain a strictly neutral attitude. This the Company did not do * * *.”⁴

This Court itself has repeatedly recognized the coercive effect of expressions of an employer's preference: “Intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge.” *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 600. In *International Assn. of Machinists v. N. L. R. B.*, 311 U. S. 72, 78, the Court said: “The freedom of activity permitted one group and the close surveillance given another may be more powerful support for the former *than campaign utterances.*” [Italics added.]⁵ In

⁴ *N. L. R. B. v. Sunbeam Elec. Mfg. Co.*, 133 F. (2d) 856, 860 (C. C. A. 7). See also *N. L. R. B. v. Stone*, 125 F. (2d) 752, 756 (C. C. A. 7): “The campaign then being conducted, however, was not one between the Union and respondents. It was a contest toward which they should have maintained a strictly neutral attitude. The letter, even though it contained no misrepresentations, was calculated to influence and, we think, interfere with the rights of the employees to have a free election.”

⁵ See *N. L. R. B. v. Griswold Mfg. Co.*, 106 F. (2d) 713, 722 (C. C. A. 3): “The employee is sensitive and responsive to even the most subtle expression on the part of his employer whose good will is so necessary.”

It has been held that the very existence of a labor organization which the employees have reason to suppose is favored by the employer deprives them of the full freedom of choice which the Act demands. *Westinghouse Electric & Mfg. Co. v. N. L. R. B.*, 112 F. (2d) 657 (C. C. A. 2), *aff'd* 312 U. S.

the present case the advantages of the employer's position were further brought into play by the conditions under which the messages were delivered. The employees were not free to disregard the summons to hear the speech; nor were they free to disregard official communications from the management. In these circumstances respondent's presentation of itself as a candidate in the election and its appeal for loyalty were calculated to impress on the employees that lack of loyalty, as thus viewed, would incur what this Court has described as the employer's "strong displeasure." *International Assn. of Machinists v. N. L. R. B.*, *supra*, at 78.

The Board's determination of the coercive and restraining effect of the employer's utterances was thus supported by the admonitory tenor of the utterances, the economic dependence of the employees upon respondent for their livelihood, and the "tactical advantages" in the conditions under which the utterances were delivered, advantages which the unions "could not possibly match" (R. 75, 76). Normal principles of review should have impelled the court below to sustain the Board's determination.

660; *Western Union Tel. Co. v. N. L. R. B.*, 113 F. (2d) 992, 996 (C. C. A. 2). Cf. *N. L. R. B. v. Waterman Steamship Corporation*, 309 U. S. 206. *A fortiori*, an employer's expressed disapproval of self-organization infringes the rights which the Act guarantees to employees.

2. Since the employer's utterances were properly found to have a coercive and restraining effect, the interference by respondent with the right of self-organization guaranteed to its employees cannot be justified on the score of a privilege of free speech. See *Texas & N. O. R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 568; *Virginian Ry. v. System Federation No. 40*, 84 F. (2d) 641, 643 (C. C. A. 4), *aff'd* 300 U. S. 515.⁶ The court below, through Judge Learned Hand, the author of the present opinion, had earlier furnished what we submit is the proper touchstone in this class of controversies. In *N. L. R. B. v. Federbush Co.*, 121 F. (2d) 954, 957, the court said:

No doubt an employer is as free as anyone else in general to broadcast any arguments he chooses against trades-unions; but it does not follow that he may do so to all audiences. The privilege of "free speech," like other privileges, is not absolute; it has its seasons; a democratic society has an acute interest in its protection and cannot indeed live without it; but it is an interest measured by its purpose. That purpose is to enable others to make an informed judg-

⁶ Compare state statutes restricting employers in endeavoring to influence the votes of their employees in political elections. *Arizona* 1939 Code, Secs. 43-1506, 43-1507, 43-1605; *Michigan* 1929 Comp. Laws, Sec. 3288; *Montana* 1935 Code, Sec. 10770; *Pennsylvania* Statutes (Purdon) Title 25, Sec. 3547; *Rhode Island* 1938 Gen. Law, Ch. 325, Sec. 5; *South Dakota* 1939 Code, 13.0914; *West Virginia* Laws 1937, Ch. 36.

ment as to what concerns them, and ends so far as the utterances do not contribute to the result. Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of "free speech" protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.

There was no occasion, we believe, for the court to recede from its earlier position. While the

court apparently regarded the *Virginia Electric* case as supporting a claim of privilege even where a finding of coercion would have been justified, this Court's opinion, in our view, militates against such a conclusion: "In determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways" (314 U. S. at 477). In according deference to an unduly broad construction of this Court's decision in the *Virginia Electric* case, the court below displayed undue diffidence toward its own formulation of the issue. Doubtless the court felt constrained to leave to this Court the more precise delimitation of the *Virginia Electric* decision. Compare *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275.

Decisions in the circuit courts of appeals both prior and subsequent to the *Virginia Electric* case have recognized that the constitutional guarantee of free speech does not extend to oral or written statements by employers of preferences or hostility toward unions, which the Board has found interfered with, restrained, or coerced employees within the meaning of Section 8 (1) of the Act.⁷

⁷ *N. L. R. B. v. Sunbeam Electric Mfg. Co.*, 133 F. (2d) 856 (C. C. A. 7); *N. L. R. B. v. Stone*, 125 F. (2d) 752 (C. C. A. 7), certiorari denied, 317 U. S. 649; *N. L. R. B. v. Auburn Foundry, Inc.*, 119 F. (2d) 331, 334-335 (C. C. A. 7); *N. L. R. B. v. Chicago Apparatus Co.*, 116 F. (2d) 753, 756-757 (C. C. A. 7); *N. L. R. B. v. Falk Corp.*, 102 F. (2d) 383, 389 (C. C. A. 7); *Valley Mould & Iron Corp. v. N. L. R. B.*, 116

The holdings in these cases are not in conflict with the decision below, since the orders enforced were supported by findings unaffected by the issue of free speech. The cases do, however, indicate a position with respect to that issue which is in accord with our position here.

Moreover, it has been specifically held, in accordance with the practice of the Board and the legislative history of the Act,^{*} that employers have no

F. (2d) 760, 766 (C. C. A. 7), certiorari denied, 313 U. S. 590; *N. L. R. B. v. Superior Tanning Co.*, 117 F. (2d) 881, 890 (C. C. A. 7), certiorari denied, 313 U. S. 559; *Montgomery Ward & Co. v. N. L. R. B.*, 107 F. (2d) 555, 559 (C. C. A. 7); *N. L. R. B. v. Trojan Powder Co.*, 135 F. (2d) 337 (C. C. A. 3); *N. L. R. B. v. New Era Die Co.*, 118 F. (2d) 500, 505 (C. C. A. 3); *N. L. R. B. v. Griswold Mfg. Co.*, 106 F. (2d) 713, 722 (C. C. A. 3); *N. L. R. B. v. Baldwin Locomotive Works*, 128 F. (2d) 39, 50 (C. C. A. 3); *N. L. R. B. v. Elkland Leather Co.*, 114 F. (2d) 221 (C. C. A. 3), certiorari denied, 311 U. S. 705; *N. L. R. B. v. Reed & Prince Mfg. Co.*, 118 F. (2d) 874 (C. C. A. 1), certiorari denied, 313 U. S. 595; *N. L. R. B. v. M. A. Hanna Co.*, 125 F. (2d) 786, 790 (C. C. A. 6); *N. L. R. B. v. West Kentucky Coal Co.*, 116 F. (2d) 816 (C. C. A. 6); *N. L. R. B. v. Clarksburg Pub. Co.*, 120 F. (2d) 976, 979 (C. C. A. 4); *N. L. R. B. v. A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4).

But see: *N. L. R. B. v. Union Pacific Stages*, 99 F. (2d) 153 (C. C. A. 9); *Humble Oil & Refining Co. v. N. L. R. B.*, 113 F. (2d) 85 (C. C. A. 5); *Continental Box Co. v. N. L. R. B.*, 113 F. (2d) 93 (C. C. A. 5); *N. L. R. B. v. Citizen-News Co.*, 134 F. (2d) 970 (C. C. A. 9), Judge Denman dissenting. Accord: *Jacksonville Paper Co. v. N. L. R. B.*, 12 L. R. R. 755 (C. C. A. 5), July 9, 1943.

^{*} See Senate Report 573, 74th Cong., 1st sess., p. 11: "The testimony before the committee has indicated that the active entry of some employers into a vigorous competitive race for the organization of workers is not conducive to peace in industry."

legitimate interest entitling them to participate in the process by which employees are permitted to select their bargaining representatives. See pages 9-10, *supra*.

In sum, the privilege of free speech is not available where, because of the economic dependence of the listeners upon the speaker and the compulsion upon the listeners to give heed,⁹ the adjurations of the speaker pass from the realm of free competition of ideas into that of coercion.

3. The case is not a unique or sporadic one. On the contrary, it has become evident that the very language employed in respondent's communications to its employees has been adopted for use by a substantial number of employers since the decision of the court below in the present case.¹⁰ Objections to elections because of cam-

⁹ Compare *Martin v. Struthers*, 319 U. S. 141.

¹⁰ In the following cases before the Board the language of the employer's communications to the employees was identical with that used in the *American Tube Bending* case and was obviously copied therefrom: *The Fred Goat Company*, 2-R-4098; *Auburn Spark Plug Co., Inc.*, R-5384; *R. J. Reynolds Tobacco Co.*, 5-R-1308; *Pump Engineering Service Corp.*, 8-R-1180; *Bonney Floyd Co.*, 9-R-1108; *Bonney Floyd Co.*, 9-C-1907; *Chillicothe Paper Co.*, 9-C-1902; *Vulcan Corp., Wood Prod. Div.*, R-5397; *Vulcan Corp., Wood Heel Div.*, R-5399; *A. Leschen & Sons Rope Co.*, 14-R-638; *Oberman & Co.*, 15-R-968; *Dierks Lumber & Coal Co.*, R-5226; *D. & B. Division of Emsco Derrick*, 16-R-653; *Huttig Mfg. Co.*, R-5096; *Viking Pump Co.*, R-5208.

paigning by employers are very numerous. Election disputes at present constitute the greater

In the following cases, although the language of the communications varies from that employed in the *American Tube Bending* case, the purport is in all material respects the same: *Congress Shirt Company*, 1-C-2248; *Peter J. Schweitzer, Inc.*, 2-R-3975; *Carl L. Norden, Inc.*, 2-R-3838; *Zimmer-Thomson Corp.*, 2-R-3977; *Ellicott Machine Corp.*, 5-R-1271; *Tomlinson of Highpoint*, 5-C-1545; *Coleman Furniture Corp.*, R-5168; *American Rolling Mill Co.*, 6-R-765; *Cleveland Worm & Gear Co.*, 8-R-1188; *Central Mfg. Co.*, 10-C-1373; *Servus Rubber Co.*, 13-R-1797; *Agar Packing & Provision Corp.*, 13-C-2158; *Whiting Corporation*, R-5265 (13-R-1708); *Hoosier Lamp & Stamping Corp.*, 14-C-865; *A. C. L. Haase Co.*, 14-C-828; *Vulcan Mfg. Co.*, 18-C-962; *PanTex Pressing Machine, Inc.*, 1-R-1458; *Holtzer Cabot Electric Co.*, R-5632; *Wm. R. Thropp Sons Co.*, 4-R-1101; *Cole Furniture Co.*, 5-R-1240; *Hekman Furniture Co.*, R-5441; *Owosso Metal Industries, Inc.*, R-5429; *Shakespeare Products Co.*, R-4990; *Stewart-Warner Corp.*, R-5466; *The P. Brennan Co.*, R-5390; *Graver Tank & Mfg. Corp.*, R-5285; *Illinois Meat Co.*, R-5433; *Precision Scientific Co.*, R-5320; *Rowe Mfg. Co.*, R-5153; *Servus Rubber Co.*, 13-C-2155; *Hoosier Lamp & Stamping Corp.*, R-5510; *Vulcan Corp.*, *Wood Prod. Div.*, 14-C-823; *J. L. Brandeis*, R-5194; *Boeing Airplane*, 17-R-406; *Swallow Airplane*, 17-R-536; *Watkins, Inc.*, 17-R-569; *Wilson & Co.*, 17-R-594; *Quaker Oats Co.*, 17-R-657; *Bradford-Kennedy*, 17-R-673; *Midwest Solvents*, 17-R-676; *Union Gas System*, 17-C-985; *Watkins, Inc.*, 17-C-1031; *Swallow Airplane*, 17-C-1052; *Ash Grove Lime & Portland Cement Co.*, 17-C-1066; *Fairmont Creamery Co.*, 17-C-1082; *Viking Pump Co.*, R-5209; *H. J. Heinz Co.*, R-5097; *Growers-Shippers Vegetable Assoc. of California*, C-178; *Douglas Aircraft Co., Inc.*, 21-C-2320, 21-C-2325, 21-C-2326, 21-C-2327.

"C" denotes complaint cases; "R," representation cases.

bulk of the Board's cases.¹¹ Unless the decision below is reversed it will become increasingly difficult for the Board to conduct its elections in an atmosphere of neutrality which it deems essential to the fairness of the election procedure. It is thus manifest that the problem raised by the present case is one of unusual importance in the current work of the Board.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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¹¹ See Seventh Annual Report of the National Labor Relations Board, p. 16.

